Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DONALD DWIGHT DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a law enforcement officer may stop and detain an individual based on a recently-arrested informant's tip that the individual is selling drugs at a particular location and time of day, without corroboration that the individual has actually engaged in suspicious activity the day he is stopped, based on this Court's recent decision in *Florida v. J.L.*, 2000 WL 309131 (March 28, 2000), *Illinois v. Wardlow*, 120 S.Ct. 673 (January 12, 2000), and *Alabama v. White*, 496 U.S. 325 (1990)?

2. Whether a law enforcement officer may conduct a search of an individual and his vehicle after stopping and detaining the vehicle for an alleged traffic infraction, where there is no evidence that the individual is armed and dangerous, based on this Court's decision in *Knowles v. Iowa*, 525 U.S. 113 (1998)?

PARTIES TO THE PROCEEDING

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Kenneth L. Ryskamp, United States District Judge, Southern District of Florida;

Ann M. Vitunac, United States Magistrate Judge, Southern District of Florida; and

Robert J. Widmann, United States Probation Officer, Southern District of Florida.

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PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

Petitioner prays that a Writ of Certiorari be issued to review the Judgment of the Eleventh Circuit Court of Appeals entered in this cause on January 3, 2000.

OPINION BELOW

The decision from which Petitioner seeks to invoke the discretionary review of this Court, *United States v. Donald Dwight Davis*, No. 99-4299 JJ (11th Circuit), which was decided November 1, 1999, is reproduced in the appendix at A.1, and upon which the Petition for Rehearing and the Petition for Rehearing En Banc were denied on January 3, 2000, is not reported. (A.2).

JURISDICTION OF THIS COURT

The Eleventh Circuit Court of Appeal's opinion was filed on November 3, 1999, and rehearing was denied on January 3, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). These opinions are printed in the appendix (A.1 and A.2) to this petition. The oral findings of the trial court are attached in Appendix C (A.5) and the final judgment of the trial court is attached in Appendix E (A.19).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV, United States Constitution, provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . .

Amendment XIV, § 1, United States Constitution, provides, in pertinent part:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE AND FACTS

Petitioner, Donald Dwight Davis, was the Appellant in the Eleventh Circuit Court of Appeals.[1] The facts of the case were established in the evidentiary hearing held by the trial court (the district court, Kenneth L. Ryskamp, Southern District of Florida), on Petitioner's motion to suppress narcotics. Excerpts of the transcript of the hearing are attached in Appendix C (A.3). Based on Petitioner's possession of the narcotics, he was indicted on or about August 27, 1998, for possession with intent to distribute a Schedule II narcotic controlled substance, in violation of 21 U.S.C. § 841(a)(1). (R1-1-1). The district

[1] Pursuant to Supreme Court Rule 14(b)(i), references to the record ("R") are to the record on appeal filed with the Eleventh Circuit Court of Appeals.

court denied the motion to suppress without a written order. (R2-39-Tr. 1-70, Appendix C, A.12). Petitioner pled guilty on the same day, reserving his right to appeal. (R2-39-Tr. 65-69). Petitioner was later sentenced to 262 months incarceration. (Appendix E, A.21)

In the Criminal Complaint, the affidavit of Agent Michael Shea of the West Palm Beach Police Department indicated that he instructed fellow officer Fidler "to conduct a traffic stop on Davis' vehicle." (R1-1-Aff. 3, A.16). Agent Shea wrote that Petitioner was approached and asked for his drivers license. (R1-1-Aff. 3, A.16). Petitioner was asked to exit his vehicle. (R1-1-Aff. 3, A.16). After noticing a "large protuberance in [Petitioner's] right front pocket," Agent Shea wrote that he conducted a routine "pat down" for weapons and officer safety. (R1-1-Aff. 3-4, A.16). Canine Maggie then proceeded to conduct a narcotic "odor check on the exterior of the vehicle" and as she approached the vehicle, she "demonstrated behavior consistent with that of an 'alert' for the presence of narcotics." (R1-1-Aff. 4, A.17). Nowhere in Agent Shea's affidavit was there a reference to a warning citation issued to Petitioner for any particular traffic violation.

Officer Fidler testified at the suppression hearing that he was instructed by Agent Shea to conduct a traffic stop "in the hopes of trying to catch him [Petitioner] with the contraband that [Agent Shea] thought he was bringing to 637 6th Street." (R2-39-Tr. 24). Officer Fidler made the stop of Petitioner's vehicle at 6:47 am and issued Petitioner a written warning for the offense of driving without headlights. (R2-39-Tr. 33). At the time, Officer Fidler identified Petitioner by his driver's license. (R2-39-

Tr. 33). Petitioner had committed no other crime or infraction at that time to justify the stop.

Officer Fidler stated that he issued Petitioner a warning because "the time was close to, it was getting more daylight, but is was still dark enough to have his headlights on I felt for safety." (R2-39-Tr. 35). The district court trial judge inquired of Officer Roode (another officer on the scene) whether he had his headlights on when he arrived at the scene, whereupon Officer Roode stated that he could not recall whether it was light enough for him to need his headlights. (R2-39-Tr. 52). Petitioner's signature was not on the traffic offense warning form. (R2-39-Tr. 36).

Agent Shea testified that he had arrested a suspect, John Brown, for narcotics possession on July 27, 1998, who then indicated to Agent Shea that a black male that he knew as "Triple D" supplied the narcotics to him. (R2-39-Tr. 4). Agent Shea did not provide any details on the reliability of suspect John Brown. Nevertheless, John Brown indicated that "Triple D" supplied him the narcotics in "the area of 6th and Rosemary or the 600 block of 6th Street." (R2-39-Tr. 5). Mr. Brown described the type of vehicle driven by "Triple D" as a white Oldsmobile with a maroon top and tinted windows. (R2-39-Tr. 5).

Agent Shea determined after an investigation that "Triple D" was a nickname for Petitioner. (R2-39-Tr. 5). Agents Key and Rodriguez also received information from a "concerned citizen" that Petitioner was delivering crack cocaine to the 600 and 900 block of 6th Street. (R2-39-Tr. 6). As a result, Agent Shea began surveillance of Petitioner on or about August 11, 1998. (R2-39-Tr. 7).

He thereafter observed Petitioner leaving his residence, walking to a white Oldsmobile, and driving to a house on 6th Street. (R2-39-Tr. 7). Petitioner then allegedly exited his vehicle and walked up to a rooming house, remained there for a few minutes, returned to his Oldsmobile, and then returned to his residence. (R2-39-Tr. 7). Another similar surveillance took place on August 18, 1998.

Agent Shea testified that once he arrived at the scene of the traffic stop, he also ordered Petitioner out of his vehicle. (R2-39-Tr. 9, 46). Prior to this time, Agent Shea did not see Petitioner place drugs on his person. (R2-39-Tr. 25). Petitioner exited his vehicle. (R2-39-Tr. 46). Agent Shea then advised Petitioner that the police had received information that Petitioner was delivering cocaine. (R2-39-Tr. 9). Agent Shea felt that this belief was enough to justify the stop. (R2-39-Tr. 25). He also testified that he based his reasonable suspicion on what other police officers had told him about prior incidents (ten days earlier) about Petitioner. (R2-39-Tr. 26). Officer Roode was at the scene and conducted an exterior search of Petitioner's vehicle. (R2-39-Tr. 10). As officers were speaking with Petitioner, he noticed a large bulge in Petitioner's right pocket. (R2-39-Tr. 10). Petitioner was asked about the bulge, whereupon he allegedly replied "it's personal and it's mine." (R2-39-Tr. 10). Agent Chavez then reached into Petitioner's pocket and retrieved a small milk jug. (R2-39-Tr. 10). The milk jug was placed on the ground without being searched at that time. (R2-39-Tr. 11). A police canine then positively alerted on the milk jug after it was placed on the ground. (R2-39-Tr. 11-12, 30, 51). The canine did not alert on Petitioner prior to him being searched. (R2-39-Tr. 30). Agent Shea found several pieces of crack

cocaine inside the milk jug after the canine alerted on it. (R2-39-Tr. 12). The police canine later also alerted on a brown paper bag inside Petitioner's vehicle on the back seat. (R2-39-Tr. 12-13, 51). Agent Shea found numerous empty "Ziploc baggies" along with several razor blades. (R2-39-Tr. 13).

On cross-examination, Agent Shea testified that at the time of the search, he was not investigating Petitioner for carrying any type of weapon. (R2-39-Tr. 27). Further, Agent Shea stated that up until the point that he noticed the bulge in Petitioner's pocket, he had no reason to fear for his own safety. (R2-39-Tr. 28). Further, the canine started the search of Petitioner's vehicle before Agent Shea noticed the bulge in Petitioner's pocket. (R2-39-Tr. 29). Finally, Agent Shea testified that during the surveillance period, which began ten days earlier, he never observed Petitioner commit any illegal act. (R2-39-Tr. 18, 22). Agent Shea saw Petitioner speaking with some black males in the area during that time, but he did not know what they were talking about. (R2-39-Tr. 20). He did not see any money exchange hands or other acts indicating possible criminal activity. (R2-39-Tr. 20, 23).

The district court found that Petitioner was already ordered to be stopped (by Agent Shea) before Officer Fidler noticed that his headlights were off. (R2-39-Tr. 62, A.10). Specifically, the district court opined that "I thought it seemed to me that the sun had already risen . . . I would think the headlight issue might have been an afterthought." (R2-39-Tr. 63, A.10). Nevertheless, the district court found as a matter of law that the law enforcement officers had reasonable suspicion to make the traffic stop even though during surveillance they did not see

any drugs exchange hands. (R2-39-Tr. 63-64, A.11). Further, the district court also found that the information regarding the "concerned citizen" who allegedly reported that Petitioner was dealing in drugs was "a little sloppy" and that "it certainly raised suspicion that police officers can enhance their case with a report of this type where you don't have to identify anyone and it just could be created for strengthening the case . . . it just is too convenient to have something like this to bolster a warrantless search." (R2-39-Tr. 64-65, A.12). The district court denied Petitioner's motion to suppress evidence, stating that: "under the circumstances, I think the stop was based on reasonable suspicion." (R2-39-Tr. 65, A.12).

The Eleventh Circuit Court of Appeals issued a one sentence opinion as follows:

> Because we conclude from a review of the record that law enforcement officers had a reasonable suspicion to stop appellant, which suspicion ripened into probable cause when a drug dog alerted to a container appellant was carrying that contained crack cocaine, we affirm the district court's order denying appellant's motion to suppress.

(Appendix A, A.1-A.2).

SUMMARY OF ARGUMENTS

Terry v. Ohio, 392 U.S. 1 (1968), teaches that a stop and subsequent search must be supported by reasonable

suspicion that the individual stopped is engaged in criminal activity. Reasonable suspicion is established by the totality of the circumstances, taking into account both the content of information possessed by police and its degree of reliability. *Adams v. Williams*, 407 U.S. 143, 146, (1972); *Florida v. J.L.*, 2000 WL 309131 (March 28, 2000); *Illinois v. Wardlow*, 120 S.Ct. 673 (January 12, 2000).

Agent Shea and Officer Fidler had no reason to trust the tipster before stopping, detaining, and searching Petitioner. While the Court has given police great discretion in the investigation of crime, it has always required that a forcible seizure be justified either by specific facts known to the police, or reliable outside information. "Some tips, completely lacking in indicia of reliability . . . either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized." *Adams v. Williams*, 407 U.S. 143, 147 (1972). Petitioner agrees that "[t]he concept of reasonable suspicion . . . is not readily, or even usefully, reduced to a neat set of legal rules," but must be determined by looking to "the totality of the circumstances – the whole picture." *United States v. Sokolow*, 490 U.S. 1, 7-8 (1989); *Illinois v. Wardlow*, 120 S.Ct. 673 (January 12, 2000). However, the law enforcement officers in this case simply did not corroborate the tip they received from the tipster – a known drug felon. In fact, they stopped and detained Petitioner before he even arrived at a suspicious address, several days after they saw him conducting some activity that the tipster believed was an illegal drug transaction, but that the police could not verify was an actual crime. For example, the police did not witness Petitioner commit any crime, such as exchanging narcotics. The district

court properly found that the headlight violation was an "afterthought" and did not justify the stop.

The tip in this case was too weak to support the detention. While the police across the country receive anonymous information every day, they have the means to question witnesses, observing suspects, and seek more information from the tipster, or any of a hundred other police techniques. They may not, however, decide to stop and detain persons merely because that person happens to be driving in a high crime area or because that person is known to others to possess drugs, or is known to frequent particular addresses. To conclude otherwise would be contrary to the Fourth Amendment and the decisions of this Court, particularly the recent decisions of *Illinois v. Wardlow*, 120 S.Ct. 673 (January 12, 2000), and *Florida v. J.L.*, 2000 WL 309131 (March 28, 2000).

Had the district court believed that Petitioner was stopped for a traffic infraction, as at least one law enforcement testified to during the suppression hearing, then under this Court's decision in *Knowles v. Iowa*, 525 U.S. 113 (1998), the search of Petitioner and his vehicle would have also been invalid. But even the stop for alleged drug activity did not justify a search of Petitioner and his vehicle. Further, the police conceded that there was no reason to believe that Petitioner was armed and dangerous at the time of the stop and detention. The resulting search, whereupon narcotics were found, was improper and the evidence should have been suppressed under the Fourth and Fourteenth Amendments of the United States Constitution.

ARGUMENT SUPPORTING THE GRANT OF THE WRIT

I. The Stop and Detention of Petitioner

There exists a compelling reason warranting review of *United States v. Dwight Davis*, No. 99-4299 JJ (11th Cir. November 13, 1999). The "touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). Reasonableness is "measured in objective terms by examining the totality of the circumstances," rather than by resorting to "bright-line rules" or "litmus-paper test[s]" *Ohio v. Robinette*, 519 U.S. 33, 39 (1996); *Illinois v. Wardlow*, 120 S.Ct. 673 (January 12, 2000) (Souter, dissent). Under the Fourth Amendment, a reasonable search or seizure is generally one based on probable cause. *See, e.g., United States v. Ventresca*, 380 U.S. 102 (1965). However, in *Terry v. Ohio*, 392 U.S. 1 (1968), this Court carved out a narrow exception to the general rule, allowing police to make an investigatory stop where they reasonably believe the suspect has committed, is committing, or is about to commit a crime. The duration of the stop is limited to that necessary to conduct the investigation; any further detention requires a showing of probable cause. To justify a *Terry* stop, police must possess specific, articulable facts that would " 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." 392 U.S. at 22; *see also United States v. Cortez*, 449 U.S. 411, 418-19 (1981) (citations omitted).

Reasonable suspicion must be based on more than mere speculation. "Anything less [than particularized suspicion] would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than

inarticulable hunches, a result this Court has consistently refused to sanction." *Terry*, 392 U.S. at 22. The *Terry* test still remains the law. *Illinois v. Wardlow*, 120 S.Ct. 673 (January 12, 2000).[2] In *Alabama v. White*, 496 U.S. 325, 329 (1990), this Court recognized that some tips, "suitably corroborated, exhibit sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop." *Id.* at 327. However, this Court also recognized recently in *Florida v. J.L.*, 2000 WL 309131 (March 28, 2000), that:

> Although the Court held that the suspicion in *White* became reasonable after police surveillance, we regarded the case as *borderline*. Knowledge about a person's future movements indicates some familiarity with that person's affairs, but having such knowledge does not necessarily imply that the informant knows, in particular, whether that person is carrying contraband.

Id. at *3 (emphasis added). Therefore, there is no doubt that *White* is a "close case." *Id.* In this case, the police may have conducted surveillance on two earlier occasions, but such surveillance revealed no suspicious activity, and no surveillance took place on the day that Petitioner was stopped and detained. In fact, Petitioner was stopped, presumably, on his way to the house that he was allegedly planning to sell drugs at. An individual's presence in an area of expected criminal activity, standing

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[2] Petitioner, however, argues that the facts of his case are patently distinguishable from *Illinois v. Wardlow*, 120 S.Ct. 673 (January 12, 2000).

alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime. *Brown v. Texas*, 443 U.S. 47 (1979). Indeed, a police officer's hunch will not justify a *Terry* stop, even though the officer presumably acts with the best of intentions. *See Florida v. Bostick*, 501 U.S. 429, 437 (1990) ("refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure."); *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (distinguishing between suspicious conduct and circumstances typical of a "very large category of presumably innocent travelers"). Therefore, the tip in this case lacked the indicia of reliability recently affirmed in *Florida v. J.L.*, 2000 WL 309131 (March 28, 2000).

Finally, this Court should not ignore the plain hard facts of this case. There was no valid traffic stop for a headlight violation because the district court found that "it seemed to [the district court] that the sun had already risen . . . [the district court] would think the headlight issue might have been an afterthought." (R2-39-Tr. 63). Further, the district court opined that it was "too convenient" to have a confidential source justify the stop based on the Petitioner's alleged previous drug transactions. (R2-39-Tr. 65). These findings alone warrant reversal because they clearly indicate the district court's concern with the reasonableness of the initial detention. This is the touchstone of the Fourth Amendment. The undisputed fact that Officer Fidler was directed by Agent Shea to make a traffic stop of Petitioner is also alarming. (R2-39-Tr. 24). That traffic stop was to be made regardless of whether Petitioner committed any traffic crime. The district court found that the proffered reason for the

traffic stop, driving without headlights, was not supported by competent evidence. For example, the district court questioned a law enforcement officer at the scene, Officer Roode, to determine whether that officer himself had his headlights on at 6:47 am that summer morning. (R2-39-Tr. 52). The officer could not remember whether he had his headlights on. Thus, the district court thought that the headlight issue was an "afterthought." (R2-39-Tr. 63). Finally, the district court was also concerned that Petitioner received only a warning for the headlight infraction and did not sign the warning ticket. Finally, Officer Fidler (the initial officer at the scene) testified that he issued Petitioner a warning because "the time was close to, it was getting more daylight, but it was still dark enough to have his headlights on I felt for safety." (R2-39-Tr. 35). Hence, the true reasons for the stop of Petitioner are suspect. Even agreeing that the stop was really based on the information gathered by police from the informant's tip, this Court should determine under *Florida v. J.L.*, 2000 WL 309131 (March 28, 2000), that the tip was not sufficiently corroborated. Hence, the suspicion was not reasonable under the totality of the circumstances given the recent decision in *Florida v. J.L.*

II. The Search of Petitioner and his Vehicle

If an officer reasonably believes the suspect is armed and presently dangerous, and if after the stop the officer's fears are not allayed, he may frisk the suspect for weapons. *Terry*, 392 U.S. at 30. The facts of this case clearly show that no officer reasonably believed that

Petitioner was armed and dangerous. Therefore, the resulting search was improper. In *United States v. Pruitt*, 174 F.2d 1215 (11th Cir. 1999), the Eleventh Circuit, on the heels of *Knowles v. Iowa*, 525 U.S. 113 (1998), affirmed that the detention of two defendants and search of their van following a routine traffic stop was not constitutionally permissible. In this case, it is clear that Petitioner did not consent to the search of his person or vehicle. The search took place anyway.

Indeed, this Court acknowledged in *Knowles* that "[o]nce Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car." *Knowles*, 525 U.S. at 113. Chief Justice Rehnquist in the unanimous decision reasoned that routine traffic stops are "relatively brief encounter[s] . . . 'more analogous to a so-called '*Terry* stop' than to a formal arrest.' " *Id.* (ellipsis added and deleted) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984)). This Court further reasoned that, because Knowles was cited for speeding, but not arrested, the search of his car was not authorized by the "search incident to arrest" doctrine, even though the state traffic laws under which Knowles was cited provided for arrest as an alternate police remedy. *Id.* at 486-87. In this case, Petitioner was not even issued a citation. Rather, he was issued a warning for driving without his headlights on. The district court was concerned whether Petitioner could have even been charged with this offense because there was a dispute over whether a driver is required to use headlights at 6:47 a.m. in August due to adequate

lighting. (R2-39-Tr. 52). There was no evidence that lighting was poor because of weather. Rather, even one of the law enforcement officers could not recall whether he had to use his own headlights at that time. (R2-39-Tr. 52). Finally, it is equally clear that Agent Shea instructed Officer Fidler to make a traffic stop on Petitioner before he even knew whether there was a traffic violation. (R2-39-Tr. 4).

The officer's privilege to make a frisk or protective sweep flows from the authority to make a seizure. "Officer safety" does not itself justify a stop for the purpose of making a search. Here, the police had no right to frisk because neither the tip nor the officer's observations provided reasonable suspicion justifying a forcible stop. Therefore, under the plain reading of *Knowles*, and the language in *Florida v. J.L.*, 2000 WL 309131 (March 28, 2000), the search of Petitioner and his vehicle was improper and the district court should have suppressed the evidence.

CONCLUSION

When the Court first defined what has come to be called the reasonable suspicion standard, it observed that "[a]nything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." *Terry v. Ohio*, 392 U.S. at 22. The police would have this Court erode *Terry* to the point where inarticulate hunches are acceptable. Perhaps inarticulate hunches do succeed in recovering narcotics,

as happened in this case. Perhaps searches during traffic infraction stops would succeed in recovering narcotics. However, the police in this case could not determine why they stopped Petitioner – was it for a headlight violation, or because of the informant's tip? This frustration on the part of the police clearly indicates that they believe that *Terry* has been so eroded that this Court will permit forcible seizures based on "something less" when an informant gives some details of criminal activity. Finally, as the decision of *Florida v. J.L., supra*, did not exist at the time of Petitioner's appeal, there should be a remand to the Eleventh Circuit Court of Appeals for further consideration in light of *Florida v. J.L.* More importantly, this Court should grant the petition so that the police are required, at the least, to give one believable and constitutionally acceptable reason for the stop, detention, and search of the Petitioner. For the reasons given above, the petition should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-4299
Non-Argument Calendar

D.C. Docket No. 98-08121-CR-KLR

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONALD DWIGHT DAVIS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(November 1, 1999)

Before TJOFLAT, EDMONDSON and DUBINA, Circuit Judges.

PER CURIAM:

Because we conclude from a review of the record that law enforcement officers had a reasonable suspicion to stop appellant, which suspicion ripened into probable cause when a drug dog alerted to a container appellant was carrying that contained crack cocaine, we affirm the

district court's order denying appellant's motion to suppress.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-4299-JJ

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONALD DWIGHT DAVIS,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ___ F.2d ___).

(Filed Jan. 3, 2000)

Before: TJOFLAT, EDMONDSON and DUBINA, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubin
UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. DONALD DWIGHT DAVIS, Defendant.	)))))))	Docket No. 98-8121-CR-RYSKAMP West Palm Beach, Fl. October 19, 1998

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TRANSCRIPT OF SUPPRESSION HEARING
BEFORE THE HONORABLE KENNETH L. RYSKAMP

APPEARANCES:

For the Government: KAREN ATKINSON, ESQ.

For the Defendant: JOHN A. GARCIA, ESQ.

* * *

[58] It looks like from the information provided to the court so far, the first gentleman that provided the information was in fact a man that had been arrested and from reading the second source, although you can't tell, it seems like this was another gentleman or person that had actually been pulled over and possibly was giving information that maybe saved their person rather than get arrested for whatever they were doing at that particular point in time.

THE COURT: I don't think the information here came from the person being pulled over because what

this person would be saying in front of the defendant, that this guy is delivering drugs and that's not very likely. I would say it was more likely that this information came prior to them being pulled over, but you can't tell from this.

MR. GARCIA: Again, what we basically have here, though, this is a warrantless search. I think everybody would pretty much be in agreement that this in fact was a warrantless search.

THE COURT: I think that's established.

MR. GARCIA: And the government has the burden of providing or establishing an exception to that based on the testimony here today and I think the court has been taking town [sic] notes and been paying attention and is actually concerned about whether or not the stop itself was illegal has something to do with whether or not the government has met their burden of [59] whether or not they could actually search Mr. Davis.

Again, with that –

THE COURT: Why wouldn't this be illegal under Terry?

MR. GARCIA: Why wouldn't it be illegal under Terry?

THE COURT: Why it would be illegal under the Terry decision?

MR. GARCIA: I don't think this is an exception to a search. I don't think this is a reasonable search of Mr. Davis' person because the information that had been received up to this particular point in time I don't think

led them to go ahead and search his person once they asked him –

THE COURT: They weren't searching his person. In fact, the testimony was they thought he had it in the car, not on his person. When you stop somebody who has a prior record of violence and they have something that is protruding from their pocket and it's determined to be hard, but they don't know what it is, you don't have an officer safety issue here?

MR. GARCIA: I think the court needs to look back at the testimony of both Agent Shea and then Agent Chavez.

Agent Shea testified on cross-examination that he at no point had any reason to believe that he was in fear from any of the actions that Mr. Davis was doing at that particular point in time, nor did he have any reason to believe that he was carrying a weapon because that was not in fact the issue that they were looking for at that particular point in time.

[60] THE COURT: When you do know that somebody has assaulted an officer before and has something on him, isn't it proper to do a security sweep of the person to make sure that he doesn't have a weapon?

MR. GARCIA: I would agree with the court's interpretation if Agent Shea had not said we did not believe that anything was actually up or any reason to believe that he might have been carrying something until after he made a movement to pull away from us when he had already started to search him.

I think that is the important testimony the court needs to actually reflect back upon. Obviously that does differ from Agent Chavez' testimony.

THE COURT: The way I recall his testimony, he didn't believe he was carrying drugs on him, but he didn't say anything about whether he believed he was carrying a weapon.

MR. GARCIA: It's the court's interpretation of the testimony, it was my understanding at that particular point in time they had already started a patdown search of my client, although not believing that he had anything on his person, either drugs or weapons, and it wasn't until he pulled away from them that they then became in fear of their safety at that particular point in time.

I think that is one of the turning points and if the court has a different recollection, obviously, we are going to [61] rely on what the court's is.

THE COURT: Let me hear from the government on this.

MS. ATKINSON: Your Honor, this is a classic Terry stop, because even as the Eleventh Circuit stated in Mikell, which I cited in my response, even in the absence of probable cause, the police may stop a car and briefly detain it and its occupants in order to investigate reasonable suspicion that persons are involved in criminal activity.

The agents, to justify the reasonableness standard, he must be able to point to specific and articuable facts when taken together with the rationale inferences from those facts, reasonably warrant the intrusion, citing Terry.

What the officers had and they just didn't rely on the information from the concerned citizen, Detective Key and Mr. Brown, who said he got his crack cocaine from Triple D at that residence, they followed him, they ascertained the times were the same as they have been given, the vehicle was the same as they have been given, the vehicle was registered to Mr. Davis, he was residing in the same place they had been given, he was leaving his house at the same time. He was only staying a few minutes.

They ascertained everything to verify except actually seeing a hand-to-hand delivery and that is reasonable suspicion.

They also knew the defendant had a prior past for not [62] only assaulting police officers, but robbery and other crimes of violence as well as prior convictions for sale of and possession of cocaine.

When he got out of the car and Agent Chavez saw the large bulge in his pants pocket, I think the questions that counsel asked Agent Shea will have to do you didn't have any information at that time that he was carrying a gun, but when the officer saw a man with a violent past with that, that they didn't know what it was in his pocket, it was clearly for their safety they began patting him down and they didn't even open it up.

They didn't ascertain, once they ascertained that it wasn't a weapon, didn't have a gun in it, wasn't a slap or something that could be used, they set it aside and contained with their conversation of Mr. Davis.

So based on all of those factors and Terry and Williams and Mikell, they had the reasonable suspicion to briefly – to stop him and ascertain the criminal activity afoot and also he was driving without his headlights on at 6:45 in the morning.

THE COURT: He was already ordered to be stopped before anybody knew he didn't have his headlights on.

MS. ATKINSON: He was ordered to stop him, but prior to the officer stopping him, he also noticed that he did not have his headlights on. That's one more factor to be put in, [63] but clearly the officers had reasonable suspicion to believe that Mr. Davis was engaged in narcotics activity at that time and that justified their stop, and their reasonable suspicions blossomed into full-blown probable cause when Magee alerted on the jug that was on the ground.

THE COURT: All right, I don't give a whole lot of weight to the fact that he didn't have his headlights on. The other officer I interrogated, he couldn't remember what the lighting conditions were. I thought it seemed to me that the sun had already risen. Of course, he would have gotten there just a few minutes later, and furthermore, the testimony was that he was ordered to be stopped. I would think the headlight issue might have been an afterthought.

The question of reasonable suspicion is based upon the man who was arrested who had drugs on him and certainly was interested in providing some kind of cooperation that would reduce his sentence.

It was easy to identify who Triple D was because he was known to the police officers. He had a prior drug record, he had a prior violent record. The informant's description of the automobile checked out and the police conducted surveillance on two prior occasions and the times checked out, that he delivered these drugs between 7 and 7:30 in the morning.

I would find from the evidence that the police [64] officers had reasonable suspicion at that time, even though at the surveillance occasions they did not see any drugs change hands.

I think it's significant that immediately after he leaves, a number of young men who are known to be drug dealers go to the house and it doesn't take any great leap of logic to conclude that they went there because something had just been delivered.

With regard to the concerned citizen, the information is probably correct, but I think the recordkeeping is a little sloppy. It certainly raises a suspicion that police officers can enhance their case with a report of this type where you don't have to identify anyone and it just could be created for strengthening the case.

It seems to me that before you rely on something like a concerned citizen, you should have more information. I can't believe that this information came from the driver of the vehicle who is driving Davis because he would be inculpating himself if he was driving a drug dealer to deliver drugs.

There is nothing on her that I can see – well, it does. It says between 0700 and – he just says Davis is delivering everyday between those times. The vehicle was stopped – it was stopped at 11:00. So this wouldn't be on one of his regular runs, it would have been on another occasion.

Even then, the driver is not going to say at the [65] scene this guy delivers drugs between 7 and 7:30, so it must have come from some other source.

I would think even though the police don't have to provide the source to the defendant, they ought to have an internal record that the court could review in camera to find out who this person was, what the circumstances were, so I don't give a whole lot of weight to that, although I can't say that there is any evidence that the police lied about this incident. It just is too convenient to have something like this to bolster a warrantless search.

I believe that the police officers did not have enough information for probable cause so that they could go to a magistrate and get a warrant. Under the circumstances, I think the stop was based upon reasonable suspicion. Once the dog alerted to the drugs, it developed into probable cause and, therefore, I will deny the motion to suppress.

Do you need some time with your client? Are you ready to go to trial or what's the position?

MR. GARCIA: Your Honor, based on the court's ruling, I of course would like some time with my client, but I am pretty sure that that was dispositive of the case.

THE COURT: About five or ten minutes?

MR. GARCIA: Please.

THE COURT: Court will be in recess for five or ten minutes.

* * *

APPENDIX D

AFFIDAVIT

I, MICHAEL J. SHEA, being duly sworn, depose and state:

I am an officer with the West Palm Beach Police Department and have been so employed for approximately 7½ years, with 3½ of those years as a narcotics agent.

On Thursday 07/27/98 at 1300 hours, I received information from Officer Moroto, of the West Palm Beach Police Department, that he had arrested John Brown with approximately 148 pieces of crack cocaine. I read Brown his *Miranda* warnings. Brown advised that he understood his rights and he was willing to speak to me. Brown said that the person who had supplied him with the crack cocaine is a black male known to him as "triple D".

I have seen the criminal history for Donald Dwight Davis and one of his alias is listed as "three D". Brown stated that Davis arrives each day in the area of 6th Street and Rosemary Avenue, West Palm Beach, Florida, between 7:00 a.m. and 7:30 a.m. and delivers crack cocaine daily. Brown further told me that when Davis delivers crack cocaine, he arrives in a white Oldsmobile with a maroon top, and dark tinted windows. The crack cocaine that Brown was arrested with was inside a red plastic McArthur milk container.

On Tuesday, August 4, 1998, at 1000 hours, I received information from Agent Rodriguez of the West Palm Beach Police Department, who advised me of the following: Agent Rodriguez was contacted by Officer Maale of

the West Palm Beach Police Department. Officer Maale is assigned to patrol the area of the city that includes Sixth Street, and Rosemary Avenue. Officer Maale said that he had received information from a concerned citizen that Davis was delivering crack cocaine to the 600 and 900 block of 6th Street, West Palm Beach, Florida. The concerned citizen told Officer Maale that Davis arrives in the area between 7:00 a.m. and 7:30 a.m., and that Davis operates a 1988 Oldsmobile Delta 88 with Florida tag XYP-44L. The concerned citizen further described the vehicle as Maroon over white with dark tinted windows.

On Tuesday 08/11/98 at 0645 hours, members of the City of West Palm Beach Police Department Narcotic Unit conducted surveillance at 409 53rd Street, West Palm Beach, Florida. At 0710 hours, I observed Davis exit his residence and walk directly to his 1988 Oldsmobile Delta 88, Maroon over white bearing Fla. tag XYP-44L. The car is registered to Donald Dwight Davis. Davis proceeded to drive to 637 6th Street, West Palm Beach. Davis stayed inside the residence for less than five (5) minutes and returned to his vehicle. Agents followed Davis back to his residence.

Once Davis left 637 6th Street, several black males arrived in the area. The majority of these black males are known to Agents as street level crack dealers.

On Tuesday, August 18, 1998, at 0645 hours, members of the City of West Palm Beach Police Department Narcotic Unit again conducted surveillance at Davis' residence. At 0720 hours, Agent Rodriguez observed Davis exit his residence and walk directly to his 1988 Oldsmobile Delta 88. Davis entered his vehicle and proceeded

west on 53rd Street to Broadway. Davis proceeded directly to 637 6th Street, West Palm Beach, Florida.

Once in front of 637 6th Street, Davis exited his vehicle and walked into the residence. Davis stayed inside the residence for a few minutes and left the area. Once Davis left the area several individual known to your affiant as street level crack cocaine dealers went into the residence.

On Friday, August 21, 1998, at 0645 hours, members of the City of West Palm Beach Police Department Narcotic Unit went to 409 53rd Street to conduct surveillance on this residence. Once at the residence Lt. Sowers observed Davis driving west on 53rd Street towards Broadway. Once at 45th Street and Broadway I or [sic] advised Officer Fidler to conduct a traffic stop on Davis' vehicle. Davis was stopped in the parking lot of a vacant gas station on the northwest corner of 45th Street and Broadway. Once the vehicle stopped, Officer Fidler approached Davis and asked him for his drivers license. I then approached the vehicle and asked Davis to exit his vehicle. Davis complied and walked to the rear of the vehicle. I then spoke to Davis and advised him that I had received information that he was delivering crack cocaine. Agent Chavez, Agent Chaparro, Agent Rodriguez and I observed a large protuberance in his right front pocket. As Agent Chavez knew Davis had prior arrests for resisting a police officer with violence and battery on a police officer, he conducted a routine "pat down" for weapons and officer safety. As he attempted to pat down Davis, Davis turned away preventing Agent Chavez from feeling the object in Davis' pocket. Agent Chavez told Davis that he was just doing

this for officer safety. During the pat down, Agent Chavez discovered that the object in the right front pocket was firm. Agent Chavez then asked Davis what was in his pocket. Davis replied "it's personal and it's mine". Agent Chavez could not identify the object, but fearing that it could be used as a weapon, he removed it from Davis' pocket. The object which was a red plastic McArthur milk container, i.e. "a chug" which Agent Chavez placed on the ground.

Agent Roode with, K-9 "Maggie", a duly certified narcotic dog, proceeded to conduct a narcotic odor check on the exterior of the vehicle. Once "Maggie" approached the milk container, she demonstrated behavior consistent with that of an "alert" for the presence of narcotics. Agent Roode confirmed that Maggie had indeed alerted on the milk container. I retrieved the container and opened it. I discovered numerous small ziplock baggies containing what appeared to be crack cocaine. The suspected crack cocaine weighed 30.8 grams. There were one hundred forty six (146) individually packaged pieces of crack cocaine. Each piece is commonly sold for twenty dollars. The suspected crack cocaine was tested utilizing a "Val-Tox" test. The test was positive for the presence of cocaine. Davis was placed under arrest.

Agent Roode proceeded to conduct a narcotic K-9 search on the interior of Davis' vehicle. Agent Roode advised that K-9 "Maggie" had again "alerted" to a narcotic odor coming from a brown paper bag which was lying on the back seat of the vehicle. I removed the paper bag from the vehicle and looked inside. I located numerous small empty zip lock baggies and several razor blades inside the bag.

Based on the foregoing your affiant has probable cause to believe that Donald Dwight Davis possessed with intent to distribute crack cocaine in violation of 21: U.S.C. § 841(a)(1). FURTHER YOUR AFFIANT SAYETH NAUGHT.

/s/ Michael J. Shea
MICHAEL J. SHEA, Agent
West Palm Beach Police
Department Organized Crime
Division

Sworn to and Subscribed to
before me this 21th [sic]
day of August, 1998.

/s/ Ann E. Vitunac
ANN E. VITUNAC
UNITED STATES MAGISTRATE JUDGE

APPENDIX E

United States District Court
Southern District of Florida

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
V.	**(Filed Feb. 1, 1999)**
DONALD DWIGHT DAVIS	**(For Offenses Committed On or After November 1, 1987)**
	Case Number: 9:98CR08121-001
	John Garcia, Esq.
	Defendant's Attorney

THE DEFENDANT:

[X] pleaded guilty to count(s) ONE of the One County Indictment on 10/19/1998

[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

[ ] was found guilty on count(s) _____ after a plea of not guilty.

Title & Section	**Nature of Offense**
21 U.S.C. § 841 (a)(1)	Possession with Intent to Distribute crack cocaine

Date Offense Concluded	**Count Number(s)**
08/21/1998	One

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____

[ ] Count(s) _____ (is) (are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 263-55-7166
Defendant's Date of Birth: 06/02/1963
Defendant's USM No.: 53336-004
Defendant's Residence Address: Palm Beach County Jail West Palm Beach FL 33409
Defendant's Mailing Address: Palm Beach County Jail West Palm Beach FL 33409

2/12/99
Date of Imposition of Judgment

/s/ Kenneth L. Ryskamp
Signature of Judicial Officer

KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE
Name & Title of Judicial Officer

2/16/99
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 262 month(s).

This is the total term of imprisonment as to the One Count Indictment.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] at ____ a.m./p.m. on _____.

[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before 2 p.m. on _____.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Office.